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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 725

SIDNEY SCHWARTZ,

Petitioner,

v.

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT

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IN THE

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No.

SIDNEY SCHWARTZ,

Petitioner,

v.

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT

Petitioner Sidney Schwartz prays that a Writ of Certiorari issue to review the judgment of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, entered on July 1, 1965.

Jurisdiction

The judgment of the Appellate Division, First Department, New York State Supreme Court, was entered on July 1, 1965 unanimously affirming without opinion, petitioner's conviction on January 4, 1965. Leave to appeal to the New York State Court of Appeals was denied on August 6, 1965 and reargument of the decision of the New York State

Court of Appeals refusing to grant leave to appeal was denied on August 18, 1965.

The jurisdiction of this Court is invoked under 28 U.S.C. section 1257(3).

Questions Presented

1. Where petitioner had given law enforcement agents authority to inspect, in his office, his personal books and records, and books and records of a partnership in which he was a general partner, was it a violation of his Constitutional right to be free from unreasonable seizures and his Constitutional right to refuse to incriminate himself, for the State, without authorization, to seize those records and use them as evidence in the trial below against petitioner?

2. Where petitioner was being investigated by the State of New York, and where his counsel had agreed with the State to make books and records available in petitioner's office, and where three State agents seized those books and records, was there a knowing and intentional consent by petitioner to waive his Constitutional right to be free from unreasonable seizures and his Constitutional right to refuse to incriminate himself?

Constitutional Provisions Involved

The Fourth, Fifth and the applicable portion of the Fourteenth amendment to the Constitution are printed in Appendix B, *infra*, page 23.

Statement

Petitioner Sidney Schwartz was tried and on January 4, 1965 was convicted in the Supreme Court of the State of New York, New York County of the following crimes:

causing a false statement as to securities to be made in an offering prospectus in violation of § 952 of the New York Penal Law (Count 1); obtaining a signature to a written instrument by use of a false statement or writing in violation of § 932 of the New York Penal Law (Counts 3, 4 and 5); engaging in a fraudulent device or scheme to obtain money in violation of § 352(c) of the New York General Business Law (Count 7); and commiting a fraud in the affairs of a limited partnership in violation of § 920 of the New York Penal Law (Count 8). Petitioner was sentenced to one year on Counts 1, 3, 4 and 5; 6 months on Count 7; and 6 months on Count 8, all sentences to run concurrently. Count 2 was dismissed by the Court and Count 6 was withdrawn by the People (R. 1175). Those counts charged that petitioner obtained the signature of a person to a written instrument with intent to defraud in violation of § 932 of the New York Penal Law.

According to the evidence in the Court below, petitioner was a general partner and in control of Beaux Arts Associates, a limited partnership organized by him in November 1960 for the purpose of obtaining a long term ground lease to Beaux Arts Apartments, located in Miami Beach, Florida (People's Ex. 1). In order to raise funds for acquisition of the lease, a prospectus dated February 23, 1961 was issued, which stated that an offering was being made consisting of $790,000 in additional limited partnership units of Beaux Arts Associates, and that the capital structure would consist of $85,000 in subordinated limited partnership units and $790,000 in additional limited partnership units (*Ibid.*).

The indictment charges that the statements in the prospectus that the offering consisted of $790,000 in limited partnership units and $85,000 in subordinated limited partnership units were false. This alleged false statement is the foundation for the proof of each count in the indictment.

In order to prove that the statements were false, the State relied on the following personal books and records of the petitioner which, as we shall show below, were illegally seized from petitioner, were prejudicial to petitioner, and were introduced in evidence over timely objection of petitioner:

a. Petitioner's cash receipts and cash disbursements book reflecting deposits and withdrawals in an account called "Sidney Schwartz Special Royal State Bank" (People's Ex. 51, R. 454-56, 856).

b. Petitioner's cash receipts and cash disbursements book reflecting deposits and withdrawals in an account called "Sidney Schwartz Regular Trade Bank" (People's Ex. 52, R. 456-58, 856).

We believe that it will be undisputed that the above personal books and records which were seized from petitioner were prejudicial to him at the trial. We also believe that it will be undisputed that if the above books and records were illegally seized then the judgment of conviction must be reversed.

The personal books and records, according to the State's theory of the case, aided the State in proving the alleged falsity of statements in the prospectus that the Beaux Arts Associates offering consisted of $790,000 in additional limited partnership units and that the capital structure of the partnership consisted of $85,000 in subordinated limited partnership units and $790,000 in additional limited partnership units. The State used the personal books and records in an effort to show that over-sales of partnership units were made by petitioner, proceeds of which went into his own personal account, which when considered with the partnership books and records, show sales of partnership units higher than stated in the prospectus. (See R. 541, 612-15, 633-34, 658, 856, 860-61, 896-97.)

The State also contended that the personal books and records showed concealment and co-mingling of funds be-

tween petitioner personally and the partnership, indicating an intent by petitioner to use partnership funds as his own and showing that rebates of partnership funds were deposited in petitioner's personal accounts. (See R. 470-72, 589, 856-57.) Thus, the personal books and records were prejudicial to petitioner with respect to each count of the indictment of which he was convicted.

In order to prove its case against petitioner, a general partner of Beaux Arts Associates, the State also relied upon the following Beaux Arts Associates books and records which also were illegally seized with petitioner's personal books and records:

a. Cash receipts and disbursements book known as "Sidney Schwartz Beaux Arts"; checkbook and cancelled checks on account entitled "Sidney Schwartz Special Beaux Arts", maintained at the Trade Bank and Trust Company[1] (Exs. 43, 44, 45, 45A and 45B, R. 864-65).

b. Cancelled checks of Beaux Arts Associates, drawn on the Royal State Bank of New York (People's Ex. 47, R. 448).

c. Second Beaux Arts cash disbursement book for 1961 (People's Ex. 48, R. 450).

d. Second cash disbursement book for 1962 for Beaux Arts Associates (People's Ex. 49, R. 452).

e. Records reflecting 1961 distributions to the limited partners of Beaux Arts Associates (Ex. 53, R. 458).

f. Beaux Arts ledger sheets of investors for the year 1962 reflecting distributions to investors in that year (Ex. 54, R. 461).

g. Record of investors in Beaux Arts Associates (People's Ex. 55, R. 464).

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[1] There is evidence in the record that these were petitioner's personal documents (R. 864-65).

h. Partnership agreement of Beaux Arts Associates (People's Ex. 56, R. 466).

i. General Ledger of Beaux Arts Associates for the year 1961 (People's Ex. 57, R. 467).

j. Second General Ledger of Beaux Arts Associates for the year 1961 (People's Ex. 58, R. 469).

We believe that it will be undisputed that if the partnership records, which were prejudicial to defendant, were improperly received in evidence, the conviction must be reversed.

The record below shows that the above personal and partnership books and records were illegally seized from petitioner by agents of the State of New York in violation of the Fourth and Fifth Amendment rights of petitioner as guaranteed to him by the Fourteenth Amendment and that it was improper for the Court below to deny petitioner's motion to suppress this evidence, which was timely made and renewed at the trial. (See papers in support and in opposition to petitioner's motion of February 18, 1964 to suppress, and decision of Mr. Justice Sarafite dated February 27, 1964, App. A, *infra*, p. 20. See also R. 443-44. There was incorporated by reference, in the aforesaid motion the papers in support of and in opposition to petitioner's motion for an inspection of grand jury minutes and a dismissal of the indictment. That motion was denied by Mr. Justice Gellinoff on October 21, 1963, App. A, *infra*, p. 22.)

The above records were seized in petitioner's office by three agents of the Attorney General of the State of New York on October 2, 1962 (See papers in support of and in opposition to motion to suppress. See also R. 507-509). The record below shows that at the time of the seizure the agents were acting on authority of a letter dated September 13, 1962, from the defendant's then attorney, Sidney

M. Wittner, Esq., to the "Office of the Attorney General." The letter states the following in its entirety:

> "This is to advise you that pursuant to your request Mr. Sidney Schwartz's office has been authorized to make all books and records available for your examination at Mr. Schwartz's office."[2]

Mr. Saul S. Cohen, the Assistant Attorney General in charge of the investigation leading to petitioner's indictment, in an affidavit dated August 8, 1963 in opposition to petitioner's motions to dismiss and motion for inspection of grand jury minutes (later incorporated in Mr. Cohen's affidavit dated February 1964 in opposition to defendant's motion to suppress) admits that the agents who went to petitioner's office were acting under the Wittner letter of authorization. Thus, Mr. Cohen alleged that "on September 14, after he received from Mr. Wittner" the letter of authorization to go to Schwartz' office, he directed Mr. Albert Gombar, a "senior securities accountant for the department of law" to "take the authorization" and go to Schwartz' office to make an inventory (Cohen affidavit, p. 7).

Mr. Gombar went to petitioner's office, and apparently because the books and records were too voluminous to be inspected by one man alone, Mr. Gombar returned and stated that he felt additional people should be assigned to aid him (Cohen affidavit, p. 7). Obviously, Mr. Gombar did not believe that additional people should be assigned to him to seize the records from petitioner, but rather to inspect those records at petitioner's office. Additional

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[2] Ex. 16 annexed to Aff. of Ass't. Attorney General Cohen dated August 8, 1963 submitted in opposition to petitioner's motion to inspect grand jury minutes and to dismiss the indictment. This affidavit was incorporated by reference in the affidavit of Mr. Cohen dated February, 1964 in opposition to petitioner's motion to suppress evidence.

people were assigned to Mr. Gombar and on October 2, 1962, still operating under the authority of the Wittner letter and the Wittner letter alone, Mr. Gombar and two other state agents (Frederick D. Hatem and Robert Cantor) went to petitioner's office for the purpose of inspecting the records. However, the agents made no inspection of the records in petitioner's office. Indeed, the records were too voluminous to have been intelligently inspected on the day they were seized. Instead, the agents merely made an inventory of the records (See Aff. of Agent Gombar dated August 8, 1963) and, although they had no authority to do so, they seized the records listed above and took the records to the Attorney General's office for subsequent use in the criminal case against petitioner.

Two days after the illegal seizure, the Attorney General wanted to return to petitioner's office to inspect books and records which they had not seized (Cohen aff. dated August 8, 1963, p. 9). Mr. Wittner, knowing that the State agents had exceeded their authority and had illegally seized petitioner's records, repeated the limited authorization in the following handwritten endorsement placed on the original letter of authorization dated September 13, 1962 to the Attorney General, authorizing inspection to be made at petitioner's office:

> "The above includes the right to examine the books at the Beverly Hotel, but same may not be removed from the hotel." (Ex. 38 to Cohen aff. dated August 8, 1963.)

Thus, it is clear that State agents violated the agreement that the Attorney General had made with petitioner's counsel, exceeded the limits of their authority, illegally seized the petitioner's books and records and based their prosecution upon those records.

On February 18, 1964 petitioner moved to suppress that evidence.

The Court below denied petitioner's motion on the erroneous ground that "all of the evidence (books, records, documents, etc.) were produced by defendant pursuant to subpoena served by the Attorney General" (Decision of Sarafite, J., dated February 27, 1964 App. A, *infra*, p. 20). The Court's finding was clearly without support in the record and the Attorney General has repeatedly admitted that there was no subpoena outstanding at the time that the records were seized. At the trial itself, referring to these documents, the Attorney General, when asked by the Court whether or not a subpoena was outstanding at the time the agents seized these books said, "there was no subpoena outstanding at that time." (R. 507)

That there was no subpoena outstanding at the time that the seizure of records was made is clear from the affidavit of Mr. Cohen, dated August 8, 1963. Mr. Cohen states, with respect to the books and records seized on October 2, 1963, that at no time did the agents deliver to Mr. Schwartz any subpoena calling for the production of the records they took on that day (Cohen aff., p. 8). Mr Cohen also states that no subpoenas were served on Schwartz on that day or any subsequent day for the documents which were seized on October 2, 1963 (Cohen aff., p. 11).

Before trial, the Attorney General attempted to support this seizure by alleging that petitioner had consented to the seizure (See Cohen aff., pp. 7-9).[3] Significantly, the Court below did not find consent and did not attempt to support the seizure on the ground of consent. Moreover, as we shall show below, the State has not met its burden of proving by clear and convincing evidence that petitioner knowingly waived his Constitutional rights to be free from

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[3] At the trial, the Attorney General erroneously contended that all of the books and records seized were partnership books and records (R 20) and the Court below appeared to have erroneously relied on the fact that they were all partnership records in admitting them in evidence (R 20, 443).

illegal seizures, and not to incriminate himself. It is clear on this record that there was an illegal seizure, that the records which were illegally seized were prejudicial to the defendant and that the judgment of conviction should be reversed.

REASONS FOR GRANTING THE WRIT

POINT I

Petitioner's personal books and records and the books and records of a partnership of which petitioner was a general partner were illegally seized and introduced in evidence in violation of petitioner's Fourth and Fifth Amendment rights as guaranteed to petitioner by the Fourteenth Amendment.[4]

The decision in the Court below is believed to be erroneous and conflicts with applicable decisions of this Court, which has long recognized that the Fourth Amendment prohibits both illegal searches and illegal seizures. *Gouled* v. *United States,* 255 U. S. 298 (1921); *Boyd* v. *United States,* 116 U. S. 616 (1885). The question presented in this case is of importance in the administration of criminal justice, for if approval is given to the conduct of the State agents here, then one might come to the erroneous conclusion that consent to an inspection or search is tantamount to consent to a seizure. We do not believe this to be the law.

There can be no question about the fact that there was an illegal seizure of petitioner's personal books and records, and of books and records of a partnership of which petitioner was a general partner. Agents of the Attorney

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[4] It is now well settled that the fundamental protections of the Fourth and Fifth Amendments are guaranteed by the Fourteenth Amendment against invasion by the States. *Stanford* v. *Texas,* 379 U. S. 476 (1965); *Malloy* v. *Hogan,* 378 U. S. 1 (1964).

General's office of the State of New York, acting under specific authority to inspect or search but not seize violated that authority and seized instead of inspected. It is important to emphasize that before the agents made the seizure they did not inspect the records, and therefore had no knowledge as to what the records contained. Indeed, it is obvious from the voluminous nature and character of the records seized that a meaningful analysis could not have been made by the agents in the short time that they were on petitioner's premises. Thus, before the seizure and subsequent audit made in the Attorney General's office the agents could not have given any testimony about what was in the records.

In *Zap* v. *United States,* 328 U. S. 624 (1946), vacated on other grounds 330 U. S. 800 (1947), agents had authority to inspect books and records on the premises of the defendant. They inspected the records on those premises and found a cancelled check which they then knew from mere inspection was evidence that a crime had been committed. The agents requested the check. It was given to them by petitioner's bookkeeper and was introduced into evidence at the trial. This Court, with three judges dissenting in a 5 to 3 opinion (Mr. Justice Jackson took no part in the decision), said that assuming that the taking of the check was unlawful, the knowledge which the agents had about the check was legally obtained and, therefore, there was no wrongdoing in the method by which the incriminating evidence was obtained.

However, the majority specifically said that "consent to the inspection did not include consent to the taking of the check." 328 U. S. at 630. Mr. Justice Frankfurter, in a dissenting opinion joined in by Mr. Justice Murphy and Mr. Justice Rutledge, said that the seizure was illegal and that the check should have been suppressed. Mr. Justice Frankfurter agreed that the government had authority to inspect petitioner's books and records and that the inspec-

tors could testify as to what they had gleaned from the inspection. Mr. Justice Frankfurter, however, went on to say:

> "But as is pointed out in my dissent in *Davis* v. *United States,* decided this day, *ante,* p. 594, the constitutional prohibition is directed not only at illegal searches. It likewise condemns invalid seizures. And that is the issue here. The legality of a search does not automatically legalize every accompanying seizure."

In the instant case the reasoning of the majority of the Court in *Zap* would not apply because the agents made no inspection before they seized the records and, therefore, before the illegal seizure had no knowledge as to what the books and records contained. Thus, the agents could not have testified about the contents of those books and records.

It should be noted that in *Zap* the Government argued that the seizure was proper because the check itself had been the instrumentality of a crime, was found in the course of a lawful search and therefore was admissible (Government's Br. *Zap* v. *United States*). No such argument may be made in this case because the documents seized could, in no sense, be regarded as instrumentalities of a crime. In addition, even if the documents seized had been instrumentalities of a crime, they could not have been lawfully seized as such by the agents who had no knowledge of their contents.

It has long been recognized that the Fourth Amendment prohibits both (a) illegal searches and (b) illegal seizures. As was stated in the widely quoted concurring opinion by Justice Miller in *Boyd* v. *United States,* 116 U. S. 616, 641 (1885), "the things herein forbidden are two: search and seizure." This Court has long held that a lawful search does not necessarily justify a seizure and that it is improper to introduce in evidence documents found pursuant to a lawful inspection but which are illegally seized. *Gouled* v. *United States,* 255 U. S. 298 (1921); *Kremen* v. *United States,* 353 U. S. 346 (1957).

In *Gouled* v. *United States,* 255 U. S. 298 (1921), no objection was made to the sufficiency of either the search warrant which authorized the inspection or the affidavit in support of it. Thus the search was lawful. Nevertheless, this Court held that it was improper to introduce in evidence documents which were found and seized. In that case, acting under a search warrant, government agents seized certain papers including an unexecuted form of contract between the defendant and another, a written contract signed by defendant and another, and a bill for disbursements and professional services rendered by an attorney to the defendant. Since the validity of the warrant was not tested, it follows that the officers had a right to be on the premises where they were and to see the documents which were seized. Nevertheless, this Court held that petitioner's Fourth and Fifth Amendment rights had been violated and that it was improper for the seized documents to be received in evidence because they were merely evidentiary and not the instrumentalities of a crime.

In *Abel* v. *United States,* 362 U. S. 217, 234 (1960), this Court, asking whether or not certain articles were properly seized during a lawful search, said:

> "We have held in this regard that not every item may be seized which is properly inspectible by the Government in the course of a legal search; for example, private papers desired by the Government merely for use as evidence may not be seized, no matter how lawful the search which discovers them, *Gouled* v. *United States,* 255 U. S. 298, 310, nor may the Government seize, wholesale, the contents of a house it might have searched, *Kremen* v. *United States,* 353 U. S. 346."

This Court has always scrutinized and limited the power of government agents to seize property. Officers may seize only instruments of a crime, things which may aid in escape, contraband and fruits of the crime for which the

search is made. *Harris* v. *United States,* 331 U. S. 145 (1947). The documents which were seized here fall in none of those categories, and there was no justification for their seizure.

The Fourth Amendment prohibits "unreasonable" seizures and the test of whether or not a seizure is "unreasonable" is not rigid or absolute. Each case is to be decided on its own facts and circumstances. *Harris* v. *United States, supra; Go-Bart Importing Co.* v. *United States,* 282 U. S. 344 (1931). Under the facts and circumstances of this case, there was no justification for the seizure which therefore must be characterized as unreasonable.

The State had no right to possession of these documents. If it desired possession it should have proceeded in a lawful manner or not at all. *Gouled* v. *United States, supra.* Since the records were not instrumentalities of a crime, nor the fruits of a crime, no valid search warrant could have been issued for them. *Harris* v. *United States, supra.* However, if the State desired possession it could have attempted to negotiate with counsel for petitioner for possession instead of the more limited right to inspect. If petitioner refused to voluntarily surrender possession the State could have issued a subpoena and a Fifth Amendment claim of privilege may have been made. Indeed, it was probably to avoid a claim of privilege that the State was willing to agree to examine the records in petitioner's office. Certainly, the Attorney General knew, and as the Attorney General argued below, defendant Schwartz was told that he could claim privilege against self-incrimination and refuse to produce his personal records (See Cohen aff. dated August 23, 1963, p. 2). Apparently, rather than face the possibility that insistence on production of the documents in response to a subpoena would be resisted by a claim of privilege against self-incrimination, the Attorney General agreed to examine petitioner's records in petitioner's office.

It should be noted that a claim of Fifth Amendment privilege may have been made not only with respect to the personal books and records but also with respect to the partnership books and records seized in this case. This Court has never held that the Fifth Amendment privilege does not apply to partnerships, although it has been so held by the Court of Appeals for the Second Circuit in *Silverstein* v. *United States,* 314 F. 2d 789 (2 Cir.), cert. denied 374 U. S. 807 (1963). Even assuming that *Silverstein* correctly states the applicable law, it is by no means clear that the partnership in this case is of such scope as to lead to the conclusion that petitioner held the records in a representative capacity and that *Silverstein* would be applicable. We do not raise that question separately here because:

a) Petitioner's personal books and records were seized and used in evidence to petitioner's extreme prejudice, and this is sufficient for reversal here, and

b) Petitioner being a general partner of Beaux Arts Associates had standing to make the claim that the records of that partnership were illegally seized. See *Jones* v. *United States,* 362 U. S. 257 (1960); *Henzel* v. *United States,* 296 F. 2d 650 (5 Cir. 1961).

The State chose to negotiate with petitioner and obtain a limited right to inspect the petitioner's documents in his office. The State made no inspection. Instead they made a seizure which was unreasonable and therefore illegal. The records which were illegaly seized were introduced in evidence to petitioner's prejudice, after timely efforts by petitioner to enforce his Constitutional rights, and we respectfully urge this Court to grant petitioner's writ of certiorari and ultimately reverse the conviction below.

POINT II

The State has failed to meet its burden of showing that petitioner knowingly and intentionally waived his constitutional rights.

The Attorney General erroneously attempted to support this illegal seizure on the ground that petitioner consented to the seizure. Certainly, consent to seize cannot be inferred from the September 13, 1962 letter of Mr. Wittner to the Attorney General, authorizing an inspection of the books and records in the petitioner's office.

In order to attempt to justify this seizure, the three State agents who seized petitioner's records submitted affidavits in opposition to defendant's August 9, 1963 motion for a dismissal of the indictment and for an inspection of the Grand Jury minutes. The affidavits of agents, Cantor, Gombar and Hatem, dated August 8, 1963, state in substance that on the date of the seizure petitioner, out of the presence of his counsel, consented to have certain of the books and records removed. These allegations were denied in affidavits dated August 14, 1963 of employees of Beaux Arts Associates, Alfred Leal and Laura Satz, both of whom were present in petitioner's office at the time that the seizure was made. Petitioner was not present at the time the actual seizure was made (Leal aff. dated August 14, 1963, p. 2). Mr. Leal alleged, and Mrs. Satz agreed that when the agents informed Mr. Leal that they were taking the books and records with them, Mr. Leal objected and said that he had only been instructed to show the books and records to them. Mr. Leal further alleges that one of the men said that petitioner was already under subpoena to produce the books and records, and, if necessary, another subpoena would be issued.

Even assuming the State's version of these disputed issues of fact, the State has not met its burden of proving

a conscious waiver by petitioner of his constitutional rights. The Attorney General had negotiated with the attorney for petitioner, and had agreed that the books and records would be inspected in petitioner's office. Operating under that agreement, which did not authorize removal or seizure of the records, three agents of the State of New York came to petitioner's office and now allege that, without his attorney being present, petitioner consented to the removal of books and records. Cf. *Escobedo* v. *Illinois,* 378 U. S. 478 (1964). The agents do not allege that they informed petitioner that he had a right to refuse to permit them to take the records and they have offered no explanation why they even attempted to obtain the consent of petitioner to give up possession of the records out of the presence of his counsel, when a prior different agreement had been made between the Attorney General and counsel for the petitioner.

It is clear that even on its own version of the facts the State has not met its burden of proving a knowing and intentional waiver of petitioner's Fourth and Fifth Amendment rights as guaranteed to him by the Fourteenth Amendment. "'Courts indulge every reasonable presumption against a waiver' of fundamental constitutional rights and . . . 'do not presume acquiescence in the loss of fundamental rights.'" *Johnson* v. *Zerbst,* 304 U. S. 458, 464 (1938). The waiver of a constitutional right must be with "understanding" and it must be "intentional", *Johnson* v. *United States,* 333 U. S. 10, 13 (1947). To be voluntary, a consent must be " 'unequivocal and specific,' " and " 'freely and intelligently given' ", *Judd* v. *United States,* 190 F. 2d 649, 651 (D. C. Cir. 1951).

In this case, under the State's version of the facts, three agents went to petitioner's office knowing that they had been authorized to inspect but not seize. There, in the absence of his attorney, they extracted from him a so-called "consent." Such a consent is not a conscious waiver

of a constitutional right, particularly when an agreement had been reached between counsel for the State and counsel for the petitioner that the books and records would be inspected only in the office of the petitioner.

Furthermore, under the version of the facts given by Mr. Leal and Mrs. Satz, there was clearly not only a lack of consent, but an objection was made that the authorization of the State was only to inspect not to seize the records (Leal and Satz affidavits dated August 14, 1963). In addition, under the version of the facts given by Mr. Leal and Mrs. Satz, State agents actually coerced and misrepresented the facts by erroneously stating that a subpoena was outstanding and that if the books and records were not released a subpoena would be issued. Taking the State's version, or petitioner's version of the facts, there was no consent in this case, and the records were illegally seized.

Conclusion

This case presents important questions relating to distinctions between searches and seizures, and the right to be free from illegal seizures, as well as illegal searches; those distinctions were ignored below in a way which is not in accord with applicable decisions of the Court. We respectfully request that the petition for Writ of Certiorari be granted.

Respectfully submitted,

November 3, 1965.

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APPENDIX A

Judgment of Appellate Division, First Judicial Department, County of New York.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 1st day of July, 1965.

Present: Hon. Benjamin J. Rabin,
Justice Presiding,

" James B. M. McNally,
" Harold A. Stevens,
" Aron Steuer,
" Ellis J. Staley, Jr.,
Justices.

9065

The People of the State of New York,

Respondent,

vs.

Sidney Schwartz,

Defendant-Appellant.

Order of Affirmance on Appeal from Judgment

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, New York County, rendered on the 4th day of January, 1965, convicting defendant of violating § 952, Penal Law (Count 1), § 932, Penal Law (Counts 3, 4 and

5), § 352(c), General Business Law (Count 7) and § 920, Penal Law (Count 8), and said appeal having been argued by Mr. Avel B. Silverman of counsel for the appellant, and by Mr. Alan L. Kazlow of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed.

Enter:

FRANK H. CRABTREE,
Deputy Clerk.

Opinion of Justice Sarafite, dated February 27, 1964.

SUPREME COURT,

NEW YORK COUNTY,

SPECIAL AND TRIAL TERM, PART XXX.

INDICTMENT No. 2531—63

THE PEOPLE OF THE STATE OF NEW YORK

against

SIDNEY SCHWARTZ,

Defendant.

SARAFITE, J.

This is a motion to suppress evidence obtained by the Attorney General.

Defendant has been indicted on five counts of obtaining the signatures of persons to written instruments with the

intent to cheat or defraud, and three counts of related crimes.

All of the evidence (books, records, documents, etc.) were produced by defendant pursuant to subpoena served by the Attorney General. The defendant, represented by counsel, neither tested the validity of the subpoena by motion to quash nor, after responding to it, did he refuse to answer questions or produce evidence. Neither did he assert any privilege to withhold any answer given or evidence produced (See General Business Law, § 359, and Penal Law, § 2447).

It is difficult to comprehend how it could ever be argued that such evidence was obtained as a result of unlawful search and seizure.

Moreover, the issue raised here was passed upon in another form in a motion by the defendant to inspect the Grand Jury minutes and to dismiss the indictment "upon the ground that the evidence here presented was in violation of the defendant's constitutional rights in that defendant was compelled to testify and furnish evidence against himself" pursuant to subpoena, and that the indictment was allegedly based on insufficient legal evidence.

That motion was denied in all respects by the court, (Gellinoff, J., N.Y.L.J., October 24, 1963, p. 14, c. 5) holding that "defendant never availed himself of his privilege to immunity as delineated in the provisions of section 2447 of the Penal Law and section 359 of the General Business Law."

Defendant, on the same papers, now moves to suppress this same evidence.

The motion is denied.

Submit order.

Dated: February 27, 1964.

JOSEPH A. SARAFITE,
J. S. C.

Appendix A

Opinion of Justice Gellinoff, dated October 21, 1963.

SUPREME COURT

NEW YORK COUNTY

SPECIAL AND TRIAL TERM—PART 30

Index No. 2531/63

PEOPLE OF THE STATE OF NEW YORK,

against

SIDNEY SCHWARTZ,

Defendant.

GELLINOFF, J.:

Defendant moves for an inspection of the Grand Jury minutes and for a dismissal of the indictment. Insofar as the motion urges that the indictment is based on insufficient legal evidence, it is denied (see People v. Howell, 3 N Y 2d 672). In the respect that the motion is based on the claim that defendant's constitutional rights were violated in that he was compelled to testify and furnish evidence against himself, it is likewise denied. The facts of this case, and the circumstances under which defendant testified before the Attorney General, do not bring him within the *ratio decidendi* of the cases relied on by him (e.g., People ex rel. Kenny v. Adams, 292 N. Y. 65; People v. Steuding, 6 N Y 2d 214; People v. Laino, 10 N Y 2d 161). The defendant did not testify before the Grand Jury, his testimony before the Attorney General was not submitted to the Grand Jury and, to the extent that books and records delivered by him to the Attorney General under compulsion of a subpoena were later used as evidence before the Grand Jury, defendant never availed himself of his privilege to immunity as delineated in the provisions of section 2447 of the Penal Law and section 359 of the General Business Law.

Dated: October 21, 1963

J. S. C.

APPENDIX B

Constitutional Provisions.

Constitution

Fourth Amendment:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment, of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment (Section 1)

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.